**BAN HIN LEE BANK BHD.**

**v.**

**JASHBHAI NAGJIBHAI PATEL**

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 23-272-1987]
10 OCTOBER 1991

***BANKING:*** *Rate of interest not specified in letter of guarantee - Effect of - Construction of guarantee - Whether plaintiff precluded from claiming interest - Monthly statement sent only to principal debtor - Guarantor a director of principal debtor company.*

***CIVIL PROCEDURE:*** *Allegations of defendant not pleaded - Parties bound by their pleadings - Application to strike out defence - Rules of the High Court 1980 O. 18, r. 19(1)(b), (c).*

The plaintiff in this case filed an application to strike out the defence of the defendant and for leave to enter final judgment. The defendant was sued as a guarantor under a letter of guarantee and raised 4 issues:

a) that the statement of claim failed to disclose the balance due in excess of the authorised sum of RM180,000;

b) that as the rate of interest was not specified in the letter of guarantee the plaintiff was not entitled to claim any interest;

c) the guarantor was unaware of the amounts due as the monthly statement of account was sent only to the principal debtor and

d) the principal obligation for which the guarantee was executed had been altered without the defendant's knowledge or consent.

**Held:**

**[1]** As the first 3 issues raised by the defendant were not pleaded in the defence and as parties are bound by their pleadings, they would not be considered by the Court.

**[2]** The allegation that the principal obligation under the said guarantee had been altered had no merit as the guarantee itself provided that the plaintiff was entitled to do so without any further consent of the defendant.

**[3]** Although the issue as to the omission of the rate of interest was not pleaded, it was an important point. The fact that the rate of interest is left blank does not preclude the plaintiff from claiming interest as per the statement of claim as it was provided in the letter of guarantee that the interest rate could be determined by the plaintiff at a lower or higher rate from time to time. Further, the monthly statement of accounts which were sent to the principal debtor were not contested or queried by the guarantors.

**[4]** As the defendant was a director of the principal debtor, he must be deemed to have knowledge of the company's borrowing and debt.

**[5]** For the reasons above, the plaintiff is entitled to claim interest at the prescribed rate.

*[Defendant's appeal dismissed with costs.]*

**Case referred to:**
*Lee Ah Chor v. Southern Bank Bhd. [1991] 1 CLJ (Rep) 239* ***(foll)***

**Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

*For the plaintiff - Chen Mun Peng; M/s. Chew, Tan & Lim*
*For the defendant - V.M. Ravindran; M/s. V.M. Mohan*

**JUDGMENT**

**Mohamed Dzaiddin J:**

This is an appeal from the decision of the Registrar given on 29 June 1990 who ordered the striking out of the defence under O. 18 r. 19(1)(b) and (c) Rules of the High Court 1980 and gave leave to the plaintiff to enter final judgment against the defendant in the sum of RM200,353.38 with prescribed interest and costs.

The defendant was sued as a guarantor under the letter of guarantee dated 18 June 1979. On 9 October 1984, the plaintiff obtained judgment in default of appearance against the principal debtor, Jasoon Holdings Sdn. Bhd., in the sum of RM198,199.37 with prescribed rate of interest and costs. As at 25 June 1987 the judgment sum stood at RM200,353.30 with further interest. On 3 July 1987, the plaintiff through its solicitors demanded payment of the aforesaid sum from the defendant, who despite the said demand failed to pay the said judgment sum. On 20 August 1987 the plaintiff filed the present action against the defendant. On 9 December 1987 the defendant filed his defence which was subsequently amended by leave of this Court on 13 October 1989. In the meantime, on 7 April 1988 the plaintiff filed its application to strike out the defence and for leave to enter final judgment. On 29 June 1990 the Registrar granted the application.

En.Ravi, for the defendant, raised four issues in his submission. First, he contended that the statement of claim failed to disclose the balance of the remaining sum in excess of the authorised amount of RM180,000. He alleged that the defendant was never notified about this. Secondly, he said the plaintiff was not entitled to claim any interest on the judgment sum because the said letter of guarantee did not state the prescribed rate of interest and the monthly rests chargeable. Thirdly, the monthly statement of account was only sent to the principal debtor. Fourthly, Counsel said that para. 3 of the amended defence (lampiran 16) alleged that the principal obligation for which the guarantee was executed had been altered without the defendant's knowledge or consent, which was never denied by the plaintiff nor did it attempt to ask for further and better particulars on the said para. En.Ravi concluded that the defendant had raised a triable defence against the plaintiff's claim.

Cik Chen, in her submission, stated that except for the fourth point, the others were never raised in the amended defence. On the issue of the variation of the principal agreement, Counsel referred me to the affidavit of Khoo Khay Seang (lampiran 19) where he adverted to the point raised. Counsel pointed out that the answer could be seen from paras. 9 and 16 of the letter of guarantee. Likewise, on the issue of monthly rests, Counsel referred me to Clause 1(i) of the said letter of guarantee.

After considering the pleadings and the submissions of Counsel, I requested Counsel to put in a further written submission on the issue of interest on the judgment sum. It is quite clear, as raised by En.Ravi, that para. 1(i) of the letter of guarantee did not specify the rate of interest chargeable. The figure was left blank. Therefore, after reading the written submissions of Counsel I came to the following decision. With respect to the first three

issues raised by En. Ravi, these allegations were never pleaded in either the original or the amended defence. It is trite that parties are bound by their pleadings. Where the issues were not pleaded, I should not, (to borrow the words of the learned Chief Justice of Borneo in *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 CLJ (Rep) 239 at p. 246) lend countenance to En. Ravi's submission on them. As for the allegation that the principal obligation under the said guarantee had been altered without the defendant's knowledge or consent, I find there is no merit in the said averment. I am satisfied with the explanation in the affidavit of Khoo Khay Seang affirmed on 22 February 1990 (lampiran 19). Further, I am of the opinion that Clause 16 of the guarantee provides the answer. This clause states as follows:

> I/We hereby agree that you shall be at liberty without any further consent from me/us and without thereby affecting my/our liability under this guarantee at any time to determine enlarge or vary any credit to the customer and you may enforce this guarantee against me/us at any time jointly or severally notwithstanding that any bills or other instruments covered by it may be in circulation or outstanding and include the amount of the same or any of them in the said general balance or not at your option and this guarantee shall not be determinable by me/us or my/our personal representatives except on the terms of our making full provision up to the limit of my/our guarantee for any then outstanding liabilities or obligations on your part and on the customer's account.

Next, I wish to consider the effect of the omission to specify the rate of interest in the said letter of guarantee. Notwithstanding that the issue was not pleaded in the amended defence, nevertheless I consider it an important point. By paras. 3 and 8 of the statement of claim the plaintiff claimed against the defendant for the judgment sum of RM200,353.38 and for interest at the rate of 10.75% per annum from 1 June 1987 on the first RM180,000 and interest at the rate of 14.5% per annum on the remaining sum from 1 June 1987 till date of payment. The amended defence merely denies the allegation. Now, by Clause 1(i) of the guarantee, it is stipulated that the defendant and Foo See Soon agreed to pay on demand all moneys owing from the customer to the plaintiff

> including interest at the rate of ... percent per annum or at such lower or higher rate as may from time to time be determined by you at monthly rests ...

In my opinion, in the context of Clause 1(i) of the said letter of guarantee, the fact that the rate of interest is left blank does not preclude the plaintiff from claiming interest as per statement of claim because the plaintiff can still fall on the alternative phrase that is "or at such lower monthly rests ..." It follows that the bank proceeded to charge interest on the outstanding amount at the prescribed rate which must have been the prevailing rate without any protest from the guarantors. This is confirmed by the monthly statements of account sent to the principal debtor, a copy of which was exhibited in the plaintiff's supporting affidavit. It may be argued that the monthly bank statements were not sent to the guarantors. However, the defendant being a director of the principal debtor must be deemed to have knowledge of the company's borrowings and debt.

For the above reasons, I hold that the plaintiff is entitled to claim interest at the prescribed rate as per statement of claim. In view of my finding, the submission of En.Ravi on this issue becomes irrelevant. This is because my decision on the matter is based on the true construction of Clause 1(i). I concede that if interest is not agreed upon in a contract but properly claimed, then the rate of interest chargeable on the judgment sum is 8% per annum. However, in this case, Clause 1(i) of the letter of guarantee comes into play.

For reasons stated above, I find there is no valid defence and accordingly dismiss the defendant's appeal with costs.

Also found at [1992] 1 CLJ 98